

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

FOSTER LEE TARVER :
Plaintiff : CIVIL ACTION NO. 18-2071
v. : (JUDGE MANNION)
PA ATTORNEY GENERAL; AND :
DAUPHIN COUNTY COMMON
PLEAS COURT :
Defendants :

ORDER

Presently before the court is the report and recommendation (“Report”) of Magistrate Judge Martin C. Carlson ([Doc. 6](#)), which recommends that the petition for writ of habeas corpus ([Doc. 1](#)) filed in the above-captioned matter be dismissed without prejudice. Neither party has filed objections to the Report. Upon review of the Report and related materials, the Report of Judge Carlson will be adopted in its entirety.

Where no objections are made to a report and recommendation, the court should, as a matter of good practice, “satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”

[Fed.R.Civ.P. 72\(b\)](#), advisory committee notes; see also *Univac Dental Co. v. Dentsply Intern., Inc.*, 702 F.Supp.2d 465, 469 (2010) (citing [Henderson v. Carlson](#), 812 F.2d 874, 878 (3d Cir. 1987) (explaining judges should give

some review to every Report and Recommendation)). Nevertheless, whether timely objections are made or not, the district court may accept, not accept or modify, in whole or in part, the findings or recommendations made by the magistrate judge. [28 U.S.C. §636\(b\)\(1\)](#); [M.D.Pa. Local Rule 72.3](#).

On June 5, 1969, the petitioner, who was a minor at the time, was convicted of first degree murder and the three-judge panel imposed a death sentence. [Commonwealth of Pa. v. Tarver](#), No. CP-22-CR-0000043-1968, Pa.U.J.S. Docket, at *9 (Pa. Ct. Com. Pl. May 25, 2018) (Unified Judicial System of Pennsylvania Web Portal). On February 19, 1971, the petitioner's original sentence was vacated, and he was sentenced to life imprisonment without parole. *Id.* On October 30, 2017, the petitioner was re-sentenced to forty years to life imprisonment after the United States Supreme Court held that sentencing juvenile offenders to life imprisonment without parole violated the United States Constitution. *Id.*; [Miller v. Alabama](#), 567 U.S. 460 (2012). On November 24, 2017, the petitioner filed a notice of appeal to the Pennsylvania Superior Court appealing his new sentence. [Tarver](#), No. CP-22-CR-0000043-1968 (Pa. Ct. Com. Pl. May 25, 2018). The petitioner's appeal was withdrawn on May 1, 2018 and re-filed on May 25, 2018. *Id.* at 11-12. On October 25, 2018, the petitioner filed the present petition for writ of habeas corpus challenging his new sentence. ([Doc. 1](#)). The petitioner's

state court appeal is still currently pending before the Pennsylvania Superior Court. *Commonwealth of Pa. v. Tarver*, No. 875 MDA 2018, Pa.U.J.S. Appeal Docket Sheet (Pa. Super Ct. May 30, 2018). Thus, the petitioner has failed to exhaust his state court remedies before filing his petition for writ of habeas corpus as is required under 28 U.S.C. §2254. The petitioner does not present any good cause that would warrant his petition be stayed pending his decision in his state court appeal, and he will have ample time to re-file a petition after he has exhausted his state court remedies.

In this case, the court has reviewed Judge Carlson's assessment of the instant petition and agrees with the sound reasoning which led him to the conclusions in his Report. Moreover, the court finds no clear error on the face of the record. As such, the court adopts the reasoning of Judge Carlson as the opinion of the court.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

- (1) the Report of Judge Carlson (Doc. 6) is **ADOPTED IN ITS ENTIRETY;****
- (2) the petition for writ of habeas corpus (Doc. 1) is **DISMISSED** without prejudice;**
- (3) the court declines to issue a certificate of appealability; and**

(4) the Clerk of Court is directed to CLOSE THIS CASE.

s/ *Malachy E. Mannion*

MALACHY E. MANNION
United States District Judge

DATE: January 4, 2019

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